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Friday, June 02, 2006

Jurisdiction as property and peer-to-peer government

Modern civics and political science is often taught as an absurd dichotomy: that government is a "monopoly over the use of force" and that the absence of government is anarchy. Using this fallacious dialectic, many highly lawful societies, such as most of medieval Europe, and in particular medieval and renaissance England, were "anarchies." Even the United States is really an "anarchy": jurisdictions are divided up among federal, state, county, municipal and other entities, including shopping malls and mass transit authorities whose security guards can legally arrest probable criminals. (Some states even still allow "citizen arrest," although it's not recommended that people who don't understand the procedural distinctions between arrest and kidnapping try it). Government does not, and should not, come in the abstract forms taught by high school civics and political science, nor as in the economic models of law that talk about law being enforced by "the government."

In medieval and renaissance England (and in many later instances), English jurisdictions were property. The king had granted (as property called a "franchise") much jurisdiction to lords and corporate bodies (such as Church organizations, municipalities, and colonies) but owned the residual jurisdiction of the realm (i.e., all jurisdiction not owned by somebody else). This grant would take the form of a property deed called a charter. A franchise could also be owned by prescription -- i.e. by having exercised the jurisdiction since the English "time out of mind" year for prescriptive property rights, 1189 A.D.

Where franchise courts had exclusive jurisdiction, the king's courts were merely "night watchmen" courts that insured that the franchise courts stayed within their property boundaries, i.e. their jurisdictional and procedural bounds. Medieval and early colonial English courts thus formed more of a "peer-to-peer" system than the hierarchical current (Roman imperial style, or "sovereign") system where "higher courts" generally review both the procedure and substance of judgments in "lower courts."

Franchise jurisdictions were defined, by custom or statute or express charter language, by the people and legal subjects over which jurisdiction could be exercised. For example, a merchant court could exercise jurisdiction over merchants doing business at the market fair the court was appurtenant to, and the law it exercised was merchant law. This only had to be consistent with royal law in keeping within its jurisdiction (procedurally as well as territorially): substantively such laws could and often did diverge sharply from royal substantive law.

There were dozens of standard jurisdictional franchises. For example, "infangthief" enabled the franchise owner to hang any thief caught red-handed in the franchise territory, whereas "outfangthief" enabled the owner to chase the thief down outside the franchise territory, catch him red-handed, and then hang him. "Gallows" enabled the owner to try and punish any capital crime, and there were a variety of jurisdictions correponding to several classes of lesser offenses. "View of frankpledge" allowed the owner to control a local

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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militia to enforce the law. "The sheriff's pleas" allowed the owner to hear any case that would normally be heard in a county court. There were also franchises that allowed the collection of various tolls and taxes.

A corporation was also a franchise, and corporations often held, as appurtenances, jurisdictional franchises. The City of London was and is a corporate franchise. In the Counties Palatine the entire government was privately held, and most of the American Colonies were corporate franchises that held practically all jurisdiction in their territory, sometimes subject to reservations (such as the common law rights of English subjects and the right of the king to collect customs reserved in the American charters). The colonies could in turn grant franchises to local lords (as with the Courts Baron and Courts Leet in early Maryland) and municipalities. American constitutions are largely descended from such charters.

In terms of protecting personal liberties, franchises in general and colonial corporations in particular ranged all over the map. Those where Englishmen themselves settled in large numbers, such as the American colonies, tended to be protective and even expansive of liberties, but many other English colonial corporations, from the East India Company (first chartered in the late 16th century) to the Royal South Africa Company (Cecil Rhodes' colonial corporation, chartered in the late 19th century) could be authoritarian and brutal especially to non-Englishmen.

Through medieval and renaissance times, and to some extent well into the colonial period, the basic laws of English jurisdiction were property laws. The basic actions (kinds of lawsuit) contesting the jurisdiction or procedure of a court were those of title and trespass. Infringement of jurisdiction was a trespass, and abuse of a defendant by a court (i.e. violating certain common procedural laws) could be a trespass. If any person, including a royal or franchise official, confiscated a person's goods, or imprisoned an individual, or administered some other coercive remedy, he could be sued for trespass. He then had to defend his use of force as a matter of legal authority -- that he had rights as a victim seeking remedy, or rights by owning a jurisdictional franchise, and that he exercised those rights within the personal, substantive, and procedural bounds of the jurisdiction.

The king's courts could only reach inside exclusive franchise jurisdictions through the "extraordinary" or "prerogative" writs, which were writs of trespass or title. Thus, where franchise courts held the substantive jurisdiction, the king's courts generally could not review their proceedings for substantive error: only for trespassing on jurisdiction and committing certain procedural defaults, such as depriving a defendant of a right to jury trial. Indeed, many of the procedural rights specified in today's United States Constitution probably have their origins in the legal authority defense required of both franchise and royal courts to exercise coercive process without trespassing on the defendant.

David Friedman has described the legal system of medieval Iceland. This was also a peer-to-peer justice system, albeit less specialized and in some ways even more decentralized, and where personal jurisdiction was tied more to choice than to territory. In political science terms medieval Iceland has been called an "anarchy," but it is more realistic to describe it as a very peer-to-peer kind of government, where medieval England was partly peer-to-peer and partly hierarchical, and modern governments tend, on the imperial Roman model, to be quite hierarchical.

The Icelandic system was also based on a jurisdictional property, the *godord.* However, the *godord* was more a protection service, champion, legal advocate, and executor of the law than a judge. The court of last resort, since Iceland had no king, was the democratic *allthing,* but it was more than a night-watchman court as it reviewed substance as well as procedure of dispute settlements arbitrated between *godord.*

In our modern system of arbitration, based on choice-of-forum clauses in contracts, personal jurisdiction is based even more on choice, but it is embedded within our imperial Roman style hierarchical and territorial court system that reviews arbitrations for substance as well as procedure, and arbitrators depend on normal governmental entities to execute their judgments: they have no police powers of their own.

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At the same time as the American Revolution eliminated most titles, it (on top of the early Parliamentarian revolutions) eliminated most franchises, except for certain rigid forms such as municipal corporations which are no longer considered an instance of a franchise. Corporate colonies and Counties Palatine were converted into States. (Actually this process started well before the American Revolution, which was more of a climax to this process). The modern laws of interstate jurisdiction came to be derived largely from international law rather than from franchise property law, and the procedural rights of defendants were encoded in constitutions which succeeded the colonial charters. Today the word "franchise" is typically reserved to official monopolies such as water utilities and jurisdictional and police powers are defined by statute not property grant. The laws of procedure are now based on constitutions and statutes, and the laws of jurisdiction are generally derived from international law (treating for this purpose States as sovereign states) rather than the old franchise law. However, some of the extraordinary writs, such as *habeus corpus,* survive in the ability of the U.S. Supreme Court to reach into non-Article III courts (e.g. state courts, military courts, etc.) to review their proceedings, usually still on jurisdictional and procedural grounds.

I will have much more to say about the "peer-to-peer plus nightwatchmen" model of "government," and the extraordinary writs, in future post(s). I have also describe the actual English system in much more detail, in a paper to be forthcoming.

Posted by Nick Szabo at 12:27 PM

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3 comments:

Anonymous said...

The chain of title given the king derives from what? The laws and ability of the king where constituted on a Roman Empire and implemented force. Historically this is assumed identity had nothing to do with property it was a power deemed to be of a spiritual nature that was manifest on earth. The lack of a moral compass is part and parcel of the revisionist legal system being imposed by a politically active court and the juris prudence and intent of the Articles of Confederation and the Constitution are perverted by including historical authority on modern law. Since the reformation the understanding of the law has been one of whatever works rather than its historic understanding or implementation. So be comapring apples to oranges we get grape jelly. Peer to peer means equal and property is granted via celestial powers according to classic understandings of the law. The US law is a pragmatic implementation that holds not authority in any historic perspective since its sighting of Roman code. and other ancient code has proven to be false and smacked full of sphomoric mis-understandings of ancient text. It is if you will Di Vinci code law a novel made for popular consumption and the enrichment of the legal profession.

7:26 AM

Nick Szabo said...

The main (and most practical) legal justifications for medieval property ownership (or tenure, as the grantor often reserved military service or other conditions) were (1) prescription (I've been using the property therefore I own it), and (2) conquest (which essentially amounted to saying that one has a duty to protect land militarily, and the former owner didn't do it, so I did). My paper describes a debate between the descendants of William the Conqueror and his officers as to whether his officers owned their land (and appurtenant jurisdictions) alloidally or by grant from their military commander, the king.

The Church claimed that its jurisdiction over family law and similar was held of God (via the pope) and not of the king; up to Henry VIII this claim was generally respected.

"Peer to peer" describes the structure of the franchise/trespass system after property has been granted: in mathematical terms, a

cyclic graph, in contrast to the hierarchy (mathematical tree) of the Roman imperial and most modern judicial review. The original property grants were (in theory, although alloidalists disputed the theory and prescription was a huge exception to it) derived from the king in a hierarchical structure of tenure, but this played only one substantial role for jurisdictional franchises once they had been granted: the king's reservation of ability to referee the jurisdiction and procedures of franchise courts via the extraordinary writs.

2:26 PM

Anonymous said…

I'm highly jazzed about jurisdiction-as-property and I'd like a forum to completely "run with the baton". I have an alternative history baking in the oven … a sort of 19th Century juristopia type deal, and I'd like to incorporate some of the ideas from the above and your April 2006 paper on England into it. First, I have a raft of questions I need to air. Where is a good place to do it? Email, here, or my LiveJournal account?
I'd email you but … well, I'm hoping your address isn't on this page somewhere because if it is, I'm a pretty bad detective.

10:43 AM

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